RECORD AND BRIEFS

No. 16-1161

In the Supreme Court of the United States

BEVERLY R. GILL, ET AL.,

Appellants,

v.

WILLIAM WHITFORD, ET AL.,

Appellees.

On Appeal from the United States District Court for the Western District of Wisconsin

BRIEF OF AMICI CURIAE ELECTION LAW AND CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE[1]

Amici are twelve nationally recognized scholars and teachers of Election Law and Constitutional Law. All of them have substantial expertise on the subjects of redistricting and the First Amendment. Each has authored multiple scholarly articles and books on constitutional law and the democratic process. Their scholarship and experience lead them to conclude, for the reasons explained below, that the First Amendment right of freedom of association should be understood to require strict scrutiny of redistricting plans that discriminate based on political-party affiliation—partisan gerrymanders—and that Wisconsin's plan fails such scrutiny and is unconstitutional. A full list of amici, including brief summaries of their credentials and relevant scholarship, appears in the Appendix.

SUMMARY OF ARGUMENT

The First Amendment right to freedom of association protects both an individual's ability to exercise political influence by joining with like-minded others, and the right to be free from discrimination based on the political viewpoint of the groups that one joins. There is no more important way in which citizens seek to advance their political beliefs than by associating with political parties. As this Court has long recognized, party-based discrimination is anathema

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief. All parties have either filed with the Clerk a letter of blanket consent to the filing of briefs of amici curiae or given a written consent to the filing of this brief that accompanies this brief.

to the First Amendment because it infringes on individual liberty and distorts the electoral process. *See Elrod v. Burns*, 427 U.S. 347, 355-56 (1976) (plurality opinion) (recognizing that discrimination based on political party violates the First Amendment right of association because it inhibits "the individual's ability to act according to his beliefs and to associate" and "tips the electoral process in favor of the incumbent party").

Under this Court's precedents, the right to freedom of association does more than just safeguard the right to *join* a political party or other group of like-minded people. It also prohibits state regulations that *discriminatorily burden a political group's ability to influence the electoral process. See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 788 (1986); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). As Justice Kennedy suggested in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), redistricting laws that discriminatorily burden one political party at the expense of another—partisan gerrymandering—effect this type of injury and warrant strict scrutiny. Unless they are narrowly tailored to a compelling state interest, such laws must be struck down.

Recognizing that partisan gerrymandering implicates the right of association is fully consistent with this Court's right-to-vote cases under the Equal Protection Clause. The Court has long recognized the relationship between expressive association and voting, applying the same standard to association claims under the First Amendment and right-to-vote claims under the Fourteenth Amendment. *See Anderson*, 460 U.S. at 788-90; *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). Recognition of an association-based partisan gerrymandering claim would not categorical-

ly foreclose any consideration of party affiliation in redistricting. But, where party affiliation is used to draw district lines in a manner that discriminates against a political party and its adherents by placing them at a significant disadvantage relative to their statewide voting strength, that would be a severe burden that triggers strict scrutiny. *See id.* at 434. Even then, the state could defend its plan by showing that it is narrowly tailored to further a compelling interest such as ensuring compactness or preserving political subdivisions.

There is ample guidance in First Amendment case law to define when a redistricting plan imposes a discriminatory burden on association that is of such a magnitude to warrant heightened scrutiny. Here, there can be no doubt that Wisconsin's plan severely burdens the associational rights of the minority party and its adherents. To cite just one example of the abundant evidence of party-based discrimination in the record: Republicans received roughly 48% of the statewide vote and garnered 60.6% of the state's Assembly seats in 2012; two years later, when Democrats received the same percentage of the vote, they captured only 36.4% of the seats, or 24 seats fewer out of a total of 99. There is no compelling justification for the discriminatory burden that Wisconsin's plan imposes on the non-dominant party and its adherents.

The importance and urgency of this Court's adopting a legal standard by which to assess partisan gerrymandering cannot be overstated. The dominant party's incentive and ability to entrench itself in power are stronger than ever, given the increase in parti-

san polarization[2] and the hardening of partisan attitudes.[3] Enhanced technological tools are now available that enable the dominant political party in any state to draw district lines so that it not only maximizes its immediate electoral gains but also—by drawing enough "safe" seats for itself—ensures that its electoral advantage will persist for years. Moreover, because partisanship has increased and stiffened, it is even more likely now than before that the effects of such partisan gerrymandering will persist. Such substantial and durable party-based discrimination in redistricting fundamentally undermines our democracy.

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[2] *See, e.g.*, Alan I. Abramowitz, THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY (2010); SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA (Nathaniel Persily, ed., 2015); Sean M. Theriault, PARTY POLARIZATION IN CONGRESS (2008); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 Calif. L. Rev. 273, 276-81 (2011); Pew Research Ctr., *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life* 18 (2014), http://www.people-press.org/files/2014/06/6-12-2014-Political-Polarization-Release.pdf.

[3] Michael S. Lewis-Beck, et al., THE AMERICAN VOTER REVISITED, 127 (2011); Larry Bartels, *Partisanship and Voting Behavior*, 44 AM. J. POL. SCI. 35 (2000); Warren E. Miller & J. Merrill Shanks, THE NEW AMERICAN VOTER 146-50 (1996); Nicole E. Mellow, *Voting Behavior: Continuity and Confusion in the Electorate*, in THE ELECTIONS OF 2016, 87, 90-92 (Michael Nelson, ed., 2017).

ARGUMENT

A. The Right of Association Protects an Individual's Ability to Enhance Her Political Influence by Associating with Others

This Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Central to the right of association is "the advancement of political goals and ideas." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). The right to expressive association arises in part from the individual interest in gathering with others and lending one's voice to a larger cause. But that is not the only basis for this right. As this Court has recognized, the right of association also limits the dominant political group's ability to discriminate against groups that espouse a rival point of view. This Court has thus recognized that the right of association extends to rules regulating the electoral process itself and has applied a balancing test under which rules that impose "severe" burdens trigger strict scrutiny.

Freedom of association is closely linked to the First Amendment's prohibition on content and viewpoint discrimination. This Court has held that, "[a]bove all else, the First Amendment "means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department v. Mosley*, 408 U.S. 92, 95 (1972). This principle applies with special force where political speech is concerned, to ensure that the dominant political group may not stifle or diminish the collective voice of its opponents. *See* Lori A. Ringhand,

Voter Viewpoint Discrimination: A First Amendment Challenge to Voter Participation Restrictions, 13 Election L.J. 288, 291-93 (2014). This is in keeping with the long line of precedent holding that government discrimination against disfavored viewpoints or speakers contravenes the First Amendment. *See Citizens United v. Federal Election Commission*, 558 U.S. 310, 340-41 (2010) (citing cases).

Consistent with the viewpoint-neutrality principle, the Court's earliest decisions protecting expressive association have restricted government efforts to discourage or punish individuals for joining groups with disfavored viewpoints. The first example is *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958), in which the Court found that a discovery request by the State of Alabama seeking the *Clingman*identities of NAACP members triggered strict scrutiny. The Court explained that the request, if granted, was "likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate." *Id.* at 462-63. The associational interest in *Patterson* thus went beyond the right of individuals simply to join the organization; it also included the right of those with a disfavored viewpoint not to be burdened in ways that interfered with achievement of their shared "political goals." *Id.*

So too, in *NAACP v. Button*, 371 U.S. 415 (1963), the Court applied strict scrutiny to a Virginia statute that impeded free expression in the pursuit of associational viewpoints, in that case by inhibiting the NAACP's solicitation of plaintiffs in civil-rights litigation. Such litigation, the Court explained, was "a form of political expression" and particularly "a means for achieving the lawful objectives of equality

of treatment by all government, federal, state and local, for the members of the Negro community." *Id.* at 429. The Virginia statute threatened to undermine the NAACP's ability to exercise political power to further its members' viewpoints: there "inhere[d] in the statute the gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority." *Id.* at 434. It cut off a key "avenue open to a minority to petition for redress of grievances" and thereby to exert political power in furtherance of its viewpoints. *Id.* at 430.

This Court's patronage cases similarly recognize that the right of association protects both the individual interest in associating with like-minded others and the collective interest in "the free functioning of the electoral process." *Elrod*, 427 U.S. at 356. In *Elrod*, the Court held unconstitutional the practice of firing people from certain government jobs because of their party affiliation. After describing the harm to the individual liberty interest arising from this practice, the *Elrod* plurality explained that patronage "tips the electoral process in favor of the incumbent party" by allowing it to "starve [the] political opposition." *Id.* *See also id.* at 371 n.6 ("Congress may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system.") (quoting *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947)). Later patronage cases go even further than *Elrod* in limiting government consideration of party affiliation. *See, e.g., Rutan v. Republican Party of Illinois*, 497 U.S. 62, 74-76 (1990); *Branti v. Finkel*, 445 U.S. 507, 518 (1980). The principle underlying these decisions is viewpoint-neutrality, especially when it comes to government actions that might affect the electoral process. *See*

David Schultz, The Party's Over: Partisan Gerrymandering and the First Amendment, 36 Cap. U. L. Rev. 1, 45-47 (2007).

The First Amendment right of association thus implicates both the systemic interest in a fair political process and the individual interest in furthering one's beliefs, both of which underlie the patronage cases. *Elrod* and its progeny also illustrate the centrality of *political parties* to the right of association—and the corresponding harms arising from the dominant party's discrimination against a non-dominant party to entrench itself in power.

These same principles have guided the Court's consideration of state laws directly regulating the electoral process. The Court first held voting itself to be a form of expressive association in *Williams v. Rhodes*, 393 U.S. 23 (1968), striking down an Ohio ballot-access law that disadvantaged new political parties while giving "the two old established parties a decided advantage." *Id.* at 31. Later, in *Kusper v. Pontikes*, 414 U.S. 51 (1973), the Court struck down an Illinois law providing that a voter could not vote in a party primary if, in the prior 23 months, the voter had cast a ballot in the primary of another political party. The Court held that the law burdened the plaintiff's right of association because it impaired her ability to "associate effectively with the party of her choice." *Id.* at 58. The problem with the statute was not that it rendered the plaintiff unable to associate with the party of her choice: she plainly could, just not in the particular context of the party's primary elections. *Id.* Rather, the fatal problem was that the statute "constituted a 'substantial restraint' and a 'significant interference'" on a "basic function" and "prime objective" of associating with others in the ex-

ercise of political power, namely choosing a party's candidates by participating in primary elections. *Id.* *See also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981) (recognizing that ordinance limiting contributions and expenditures in ballot measure campaigns impermissibly "hobble[d] the collective expressions of a group," limiting its power to advocate effectively for the political views of its members).

These cases recognize that associational interests are implicated when people lend their individual voices to a broader chorus to advance their shared political viewpoint, both inside and outside the electoral process. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court applied this principle to discrimination based on *which* chorus of voices one chooses to join.

Plaintiffs in *Anderson* challenged an Ohio statute that required independent candidates seeking a place on the ballot to declare their candidacies before the established political parties had chosen their candidates. *Id.* at 782-83, 799. The Court concluded that this law "burden[ed] voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." *Id.* at 788. It explained that "[a] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment" because it "discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties." *Id.* at 793-94. In short, the Ohio statute placed a "particular burden

on an identifiable segment of Ohio's independent-minded voters," hindering the ability of such voters to band together and influence the political process. *Id.* at 792.

Like previous associational-rights cases, *Anderson* was concerned with the discrimination the law imposed on a group of voters' attempting to further their political beliefs through the electoral process. The statute "limit[ed] the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group," restrictions that "threaten to reduce diversity and competition in the marketplace of ideas." *Id.* at 794; *see also id.* at 788 n. 8 ("the right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and denied and equal opportunity to win votes") (quoting *Williams v. Rhodes*, 393 U.S. 23, 31 (1968)). Under *Anderson*, courts should weigh the "character and magnitude" of the injury to associational and voting rights against the state's asserted interests. 460 U.S. at 789. While "reasonable, nondiscriminatory" restrictions may generally be justified by the state's "important regulatory interests," the Court held, a stronger state justification is required if the law discriminates against an identifiable political group. *Id.*

The Court later clarified that strict scrutiny applies only to "severe" restrictions, as opposed to "'reasonable, nondiscriminatory'" ones. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 788). Since *Anderson* and *Burdick*, the Court has continued to emphasize that advancement of one's beliefs *through a political party* is central to freedom of association. *See* Daniel P. Tokaji, *Voting Is Association*, 43 Fla. St. L. Rev. 763, 777, 785 (2016).

In *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), for instance, the Republican Party challenged a Connecticut statute prohibiting independent voters from participating in its primary. The Republican Party argued that the statute "impermissibly burden[ed] the right of its members to determine for themselves with whom they will associate, and whose support they will seek, in their quest for political success." *Id.* at 214. The Court agreed, concluding that the statute "limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Id.* at 216. *See also California Democratic Party v. Jones*, 530 U.S. 567 (2000) (recognizing associational rights of major parties); *Eu v. San Francisco Co. Democratic Cent. Comm.*, 489 U.S. 581 (1989) (same).

Of course, not all burdens on political party association violate the First Amendment. *See, e.g., Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 458 (2008) (upholding blanket primary that did not severely restrict party's associational rights); *Clingman v. Beaver*, 544 U.S. 581, 589 (2005) (upholding law prohibiting members of one party from voting in another party's primary because law did not impose a severe burden). But, where the state severely restricts the associational right of a political party and its adherents by imposing *discriminatory* burdens, strict scrutiny applies.

The Court's freedom-of-association cases thus do more than simply protect individuals' ability to associate with like-minded others. They are also concerned with the ability to advance the group's shared viewpoints by *translating that association into politi-*

cal power through the ballot. *See* Guy-Uriel Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 Calif. L. Rev. 1209, 1249 (2003) ("[I]n protecting political association, the First Amendment protects more than private association. [It] also extends to election laws that burden the individual's right to make free choices and to associate politically through the vote.") Most importantly for this case, they limit a dominant political party's power to discriminate against a rival group and its supporters by diminishing their collective voice in the electoral process.

B. The Right of Association Forbids Districting that Discriminatorily Burdens Political Association Based on Party Affiliation

As the preceding section demonstrates, this Court's right-of-association cases establish that laws discriminating on the basis on party affiliation trigger strict scrutiny under the First Amendment. This principle is grounded in both the individual liberty interest in affiliating with others to advance one's beliefs and the collective interest in preventing the dominant political group from impairing the free functioning of the electoral process. In assessing election laws alleged to violate the right of association, this Court has articulated a balancing standard, under which "severe" restrictions are subject to strict scrutiny while "reasonable, nondiscriminatory" ones receive more deferential review.

This Court should apply this established standard to partisan gerrymandering. As Justice Kennedy has recognized, redistricting laws are comparable to other laws that discriminatorily restrict political-party association, including those that accomplish this objective through regulation of the electoral process. *See*

Vieth, at 314-16 (citing *Elrod*, *California Democratic Party*, *Eu*, and *Anderson*). Redistricting laws plainly affect opportunities for association: the boundaries of a district define which voters may associate with one another for purposes of advancing their viewpoints by voting for candidates within that district. A districting scheme that discriminates against a particular association of like-minded individuals—and especially a political party, which is the primary means through which individuals organize to advance their political beliefs at the ballot box—will impede the efficacy of that group's efforts to achieve its political aims.

It is well-established that "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring); *see also id.* (recognizing the "First Amendment interest of not burdening or penalizing citizens because of . . . their association with a political party"). In the context of redistricting, as in other associational-rights cases, "[t]he inquiry is not whether political classifications were used," but "whether political classifications were used to burden a group's representational rights." *Id.* at 315. Under this Court's freedom-of-association case law, a districting plan that imposes discriminatory burdens on adherents to a particular viewpoint—for instance, the independent-minded voters in *Anderson* or the supporters of the minority political party in this case—runs afoul of the First Amendment because such a plan violates the associational rights of citizens seeking to join their voices in support of candidates sharing that viewpoint.

Applying the Court's freedom-of-association jurisprudence to redistricting is fully consistent with the basic principles that have long guided redistricting decisions under the Equal Protection Clause. The Court has applied the same legal standard to both association and voting claims for over three decades. *See Anderson*, 460 U.S. at 787-89 & n.7 (recognizing that ballot-access law implicated "overlapping" associational and voting rights and applying same standard to both); *Burdick*, 504 U.S. at 433-34 (applying same standard to both voting and association claims). There is no tension between the Court's freedom-of-association case law and the Court's observation that "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Political gerrymandering does not infringe on associational rights merely by virtue of its consideration of political party affiliation. Instead, political gerrymandering infringes on associational rights when it discriminatorily burdens the proponents of a particular viewpoint.

In *Gaffney*, the Court upheld a redistricting plan that plainly protected associational rights: a statewide plan drawn to "achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties, the only two parties in the State large enough to elect legislators from discernible geographic areas." *Id.* at 752; *see also id.* ("We are quite unconvinced that the reapportionment plan ... violated the Fourteenth Amendment because it attempted to reflect the relative strength of the parties in locating and defining election districts."). Such a plan, which sought to ensure that the elected representatives roughly mirrored the electorate, cannot be said to place an undue burden on either party. To the contrary, the *Gaffney* plan considered political

viewpoint to *avoid* infringement on associational rights. By contrast, a plan that discriminates against one political party and in favor of the other should trigger strict scrutiny under the First Amendment.

As this Court's decisions make clear, state action need not completely "deprive [plaintiffs] of all opportunities to associate with the political party of their choice" in order to warrant First Amendment scrutiny. *Kusper*, 414 U.S. at 58. Instead, the Court looks to whether the action "constituted a 'substantial restraint' and a 'significant interference' with the exercise of the constitutionally protected right of free association." *Id.* (quoting *Patterson*, 357 U.S. at 462 and *Bates v. Little Rock*, 361 U.S. 516, 523 (1960)). A "significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest" but rather must be narrowly tailored to serve a compelling state interest. *Id.*; *see also Button*, 371 U.S. at 438 ("The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.").

Similarly, this Court's voting and associational rights cases call for "[a] court considering a challenge to a state election law" to assess "'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.'" *Burdick*, 504 U.S. at 434 (1992) (quoting *Anderson*, 460 U.S. at 789). When First Amendment rights are "subjected to 'severe' restrictions" by state election laws, the laws will survive only if they are "'narrowly drawn to advance a state interest of compelling importance.'" *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). By

contrast, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788).

A state election law, therefore, will not trigger heightened scrutiny on freedom-of-association grounds unless it imposes a sufficiently large and lasting burden on association. As this Court's decisions make clear, a restriction on association is "severe" and warrants strict scrutiny where it is not "reasonable [and] nondiscriminatory." Thus, in both *Kusper* and *Anderson*, the Court applied strict scrutiny where the challenged laws imposed discriminatory burdens on independent-minded voters and candidates. *See Anderson*, 460 U.S. at 793 ("A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties."); *Kusper*, 414 U.S. at 58 (strict scrutiny applied where state law forbade voters from participating in one party's primary within 23 months after voting in another party's primary).

In the context of redistricting, then, there must be a significant *discriminatory* effect on a political party and its adherents for the restriction to be deemed "severe." The mere fact that a redistricting plan yields districts that tend to result in one party's having an electoral advantage over another does not alone demonstrate discrimination or compel strict scrutiny. *Cf. Burdick*, 504 U.S. at 433. A redistrict-

ing plan that achieves a "rough approximation" in representation of those parties "large enough to elect legislators from discernible geographic areas" would not trigger strict scrutiny. *Gaffney*, 412 U.S. at 752. In those circumstances, the character and magnitude of any burden would not justify a finding that associational rights had been severely restricted. *See* id. at 434 ("[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions.") (quoting *Anderson* , 460 U.S. at 788).

But, where redistricting discriminates against a political party and its members by placing them at a significant disadvantage relative to their statewide voting strength, strict scrutiny is warranted. *Cf. Gaffney*, 412 U.S. at 754 ("[J]udicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so."). That would include cases in which a state plan undertakes "to minimize or eliminate the political strength of any group or party." *Cf. id.* (holding that state plan may not be invalidated where "it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough proportional representation in the legislative halls of the State").

The "efficiency gap" between political parties used in the district court here—"the difference between the parties' respective wasted votes in an election," defined as those cast either for a losing candidate or for a winning candidate but unessential to ensure that

candidate's victory, "divided by the total number of votes cast"—is one metric that is highly probative of when strict scrutiny is warranted. *See Whitford v. Gill*, 218 F.Supp.3d 837, 854 (W.D. Wis. 2016). The efficiency gap is a straightforward measure of the differential abilities of the parties' voters, all else being equal, to enhance their political power through association. A gap of only a handful of percentage points typically will suggest a nondiscriminatory plan of the sort approved in *Gaffney*. But an efficiency gap in excess of ten percent, as exists here—in conjunction with the other evidence of discrimination in the record—reflects a disproportionately skewed plan, to the detriment of the associational rights of those who support the views advanced by the disadvantaged political party.[4]

The persistence of a sizable efficiency gap over multiple elections will be indicative of a discriminatory and therefore severe First Amendment burden. So too will actual election results under a redistricting plan where one party is consistently able to garner a share of legislative seats significantly larger than its share of votes *and* the other party a share of seats significantly smaller than its share of votes. Evi-

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[4] There are multiple ways to measure the burden that a redistricting plan imposes on the non-dominant party. They include the efficiency gap; the seats-to-vote curve, *see* Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 Am. Pol. Sci. Rev. 1251 (1987); and the mean-median vote share difference, *see* Laura Royden & Michael Li, *Extreme Maps* (2017), *available at* https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16.pdf., at 4. These metrics are more extensively addressed in Plaintiffs-Appellees' brief and other amicus briefs being filed in support of their position.

dence of legislative intent to create or entrench a partisan imbalance likewise will suggest First Amendment harm—for instance if there are statements by legislators urging a plan that that would prevent the opposing party from gaining a majority of seats, even when it receives a majority of votes.

Even if a redistricting plan imposes a significant discriminatory burden on one political party, it could still survive if it is narrowly tailored to serve a compelling government interest. Such a plan could not, of course, be justified by any purported interest in favoring the dominant political party over a less popular one. *See Romer v. Evans*, 517 U.S. 620, 634 (1996) ("[I]f the constitutional conception of 'equal protection of the laws means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.") But a districting plan might survive if its disparate impact on one political party were justifiable in light of traditional redistricting principles such as natural geographical boundaries, contiguity, compactness, and conformity to political subdivisions. *See Bush v. Vera*, 517 U.S. 952, 959-960 (1996) (identifying traditional redistricting principles). This might be the case where, for example, a party's members are arrayed geographically such that a districting plan reflecting the party's statewide voting strength would require non-compact and unusually shaped districts. If a minority party's members were widely dispersed across a state, a statewide districting plan that yielded a proportion of legislative seats lower than the proportion of the party's supporters might be justifiable. The same would be true if a party's members were densely concentrated in several pockets of the state where it possesses super-majorities. Under such circumstances, the state's

interest in consistency and contiguity of districts might justify the burden on associational rights.

The standard we advocate does not guarantee any particular degree of political power. Rather, it protects against significant discriminatory burdens on association, in service of the central First Amendment interest in avoiding viewpoint discrimination. A party may face inherent disadvantages by virtue of geography. A state with only a few congressional districts may adopt a plan that favors one party because such a plan is necessary to avoid non-compact districts or splits of political subdivisions. But a state may not adopt a plan that discriminatorily burdens adherents of a particular viewpoint, such that their avenues to political power are effectively blocked while the dominant party is entrenched.

Nor would our proposed standard foreclose any consideration of political party in drawing lines. Rather, consistent with established voting and association precedent, it would prohibit only those plans that impose a severe burden on an identifiable political group that is not narrowly tailored to further a compelling interest. In this context, that means a plan that discriminates significantly based on political-party affiliation and cannot be justified based on traditional redistricting principles. To make this judgment does not require that the courts assess the substance of individuals' or groups' political viewpoints. Instead, it requires attention to disparities between voting strength and representational strength, informed by attention to traditional districting principles, an area in which this Court has extensive experience. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

C. Wisconsin's Redistricting Plan Violates Plaintiffs' Associational Rights

Viewed under the established freedom-of-association standard, this case is not even close. The Wisconsin plan imposes substantial and lasting discriminatory burdens on the associational rights of individuals who support one political party, and these burdens are not narrowly tailored to a compelling government interest. Accordingly, the district court's judgment should be affirmed.

The discriminatory burden on associational rights here is pronounced. Act 43 dramatically enhances the voting strength of Republican voters in the Wisconsin's State Assembly, to the detriment of Democratic voters. For instance, in 2012, Republican candidates received 48.6% of the statewide vote but secured 60.6% of the state's 99 Assembly seats. *Whitford*, 218 F.Supp.3d at 899. In 2014, Republican candidates received 52% of the vote and controlled 63.6% of the Assembly. *Id.* In other words, when Democrats garnered 48% of the statewide vote, they obtained only 36.4% of the Assembly seats, whereas when Republicans garnered essentially the same proportion of the statewide vote two years earlier they obtained 60.6% of the Assembly seats—24 more seats out of 99 for the same proportion of supporters. *See id.* at 901. Witnesses for Appellees showed that "under any *likely* electoral scenario," given the redistricting, "the Republicans would maintain the legislative majority," *id.* at 899, a result amply illustrated by the 2012 and 2014 elections, *id.* at 900-01.

Efficiency-gap methodology reinforces this conclusion. Appellees' experts showed that Democratic supporters "wasted" 10% to 13% more votes than Republican supporters in the 2012 and 2014 elections,

by virtue of the greater proportion of Democratic supporters who were either "packed" into safe Democratic districts or "cracked" across multiple districts with thin Republican majorities. *Id.* at 904; *see Davis v. Bandemer*, 478 U.S. 109, 117 n.6 (1986) (explain "the familiar techniques of political gerrymandering"). It was partly by virtue of this disparity in "wasted" votes that Republicans were able to amass such an extensive majority in the Assembly even when they had fewer voters statewide than Democrats: the choice of an additional Democratic voter to participate held much less potential to influence an election than the choice of an additional Republican voter. In other words, association by a Democratic voter with other Democratic voters had a much lower likelihood of enhancing the political influence of that voter than did association by an otherwise similarly situated Republican voter.

This Court's jurisprudence calls for assessment of the "character and magnitude" of the burden on voting and associational rights. The discriminatory burdens imposed by Wisconsin's plan are unusually large in their magnitude and enduring in character. Appellees' experts showed that an efficiency gap above 7% in a districting plan's first election year will continue to favor the entrenched party throughout the life of the plan. *Id.* at 905. An efficiency gap that can be expected to persist in this fashion necessarily would burden the associational rights of the disadvantaged party over the life of the plan. Here, Appellees' expert testified that Act 43 would *average* a pro-Republican efficiency gap of 9.5% over the decennial period, such that, in the absence of an "unprecedented political earthquake," Democrats would remain at a disadvantage. *Id.* This is the definition of a severe and invidious associational burden: individuals be-

longing to a group defined by belief or viewpoint are unable, as a result of discriminatory legislation, to associate with one another in a manner that would otherwise enhance their political power.

Evidence of legislative intent to discriminatorily burden a particular associational viewpoint is not necessarily required to make a showing of a First Amendment violation. Such evidence can, however, constitute circumstantial evidence that there such a burden exists, as the legislature intended. Here, there can be no dispute that the Assembly members behind the redistricting plan sought to discriminatorily favor Republicans. Proponents of the redistricting devised a partisan score to reflect the political makeup of districts, and they confirmed the accuracy of the score with a statistician. *Id.* at 890-91. Draft maps "bore names that reflected the level of partisan advantage achieved." *Id.* at 891. Spreadsheets "collected the partisan scores, by district, for each of the map alternatives." *Id.* Graphs were employed to allow non-statisticians to easily assess the partisan advantage of different maps. *Id.* Memoranda regarding the proposed districts referred only to the partisan breakdown, without "any information about contiguity, compactness, or core population." *Id.* at 894. One mapmaker told the Republican caucus: "The maps we pass *will determine who's here 10 years from now*," and "[w]e have an *opportunity* and an obligation to draw these maps that Republicans haven't had in decades." *Id.* This evidence, while it might not by itself show a discriminatory burden on associational rights, underscores that such a burden was both sought and achieved.

In this case, the discriminatory burden is not narrowly tailored to a compelling government interest.

As the district court found, although Wisconsin's natural political geography affords "Republicans a modest natural advantage in districting," this advantage cannot explain the vast disparities under Act 43. *Id.* at 921. It is at least relevant that, as discussed above, the clear intention of the redistricting's proponents was to serve partisan interests, rather than traditional districting principles: there is no evidence of any effort to tailor the plan based on traditional redistricting principles such as natural geographical boundaries, contiguity, compactness, or conformity to political subdivisions. Indeed, the proponents of Act 43 did not even mention these principles in pitching the Act to other members of the Assembly; instead, they noted only the partisan consequences of the redistricting. *Id.* at 894. As Appellees demonstrated, moreover, it is easily possible to draw districts with an efficiency gap well below the 10% to 14% range observed under Act 43, and indeed well below the 7% threshold at which a gap can be expected to remain throughout the decennial life of the plan. Appellees' witness devised a districting map comparable to Act 43 with a pro-Republican efficiency gap of only 2.2% for 2012. *Id.* at 920. The sheer magnitude of this difference illustrates what is obvious from the clear intention of the Act: that the discriminatory burden on associational rights was not the necessary byproduct of other governmental interests, but rather the purpose and primary consequence of the Act.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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